Nos. 82-1453 and 82-1509

In the Supreme Court of the United States

OCTOBER TERM, 1983

ERNEST BADARACCO, SR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

DELEET MERCHANDISING CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Section 6501(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides, as a general rule, that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed * * *." Section 6501(c)(1) sets forth an exception to the general rule applicable "[i]n the case of a false or fraudulent return with the intent to evade tax," providing that, in such cases, "the tax may be assessed * * * at any time."

The question presented is whether, notwithstanding Section 6501(c)(1), a taxpayer who has filed a false or fraudulent return for a particular year may, by later filing a nonfraudulent amended return for that year, secure the benefit of the normal three-year limitations period running from the date the amended return is filed.

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OPINIONS BELOW

The opinion of the court of appeals (P. Pet. App. 4a-20a; D. Pet. App. 1a-17a)[1] is reported at 693 F.2d 298. The opinion of the Tax Court in No.

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[1] "B. Pet. App." refers to the appendix accompanying the petition in the *Badaracco* case. "D. Pet. App." refers to the appendix accompanying the petition in the *Deleet* case.

82-1453 (B. Pet. App. 21a-27a) is unofficially reported at 42 T.C.M. (CCH) 573. The opinion of the district court in No. 82-1509 (D. Pet. App. 1d-5d) is reported at 535 F. Supp. 402.

JURISDICTION

The judgment of the court of appeals (B. Pet. App. 2a-3a; D. Pet. App. 1b-2b) was entered on November 29, 1982. Petitions for rehearing were denied on December 20, 1982 (B. Pet. App. 1a) and on December 23, 1982 (D. Pet. App. 1c-2c). The petitions for writs of certiorari were filed on February 24, 1983 (No. 82-1453) and March 11, 1893 (No. 82-1509). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 6501, 6503 and 6653 of the Internal Revenue Code of 1954 (26 U.S.C.) are set out in a statutory appendix (App., *infra*, 1a-5a).

STATEMENT

a. *No. 82-1453.* Petitioners Ernest Badaracco, Sr., and Ernest Badaracco, Jr., were partners in an electrical contracting business. They filed individual and partnership tax returns for 1965 through 1969; they concede that those returns fraudulently understated their income (B. Pet. App. 23a; J.A. 35a-37a). On August 17, 1971, after federal grand juries had subpoenaed the partnership's records, petitioners filed nonfraudulent amended returns for each year in question (B. Pet. App. 7a, 24a). Three months later, petitioners were indicted for filing false and fraudulent tax returns in violation of Section 7206(1) of

the Code.[2] Each pled guilty to the charge of filing a false and fraudulent partnership return for 1967, and a judgment of conviction was entered on June 6, 1973. *United States* v. *Badaracco*, Crim. No. 766-71 (D.N.J.). The remaining 14 counts of the indictment were dismissed (B. Pet. App. 7a, 24a).

On November 21, 1977, the Commissioner of Internal Revenue mailed notices of deficiency to petitioners for each year, asserting liability under Section 6653(b) for additions to tax ("penalties") on account of fraud (J.A. 5a-7a). Petitioners sought redetermination of the deficiencies in the Tax Court, contending that the Commissioner's action was barred by the statute of limitations. Petitioners stipulated that the underpayments of tax reflected on their original returns for 1965 through 1969 were, in fact, due to fraud (J.A. 35a-37a). Yet they contended that Section 6501(c)(1), which permits the Commissioner to assess taxes "at any time" in the case of fraudulent returns, did not apply. In petitioners' view, their 1971 filing of nonfraudulent amended returns triggered operation of the general three-year statute of limitations specified in Section 6501(a). Because the Commissioner failed to send the deficiency notices within three years of the date their amended returns were filed, petitioners argued, assessment of the fraud penalties was barred. The Tax Court, following its decision in *Klemp* v. *Commissioner*, 77 T.C. 201 (1981), appeal pending, No. 81-7744 (9th Cir.), agreed with petitioners. B. Pet. App. 21a-27a.[3] Ac-

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[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended ("the Code" or "I.R.C.").

[3] In *Klemp*, the Tax Court, in a reviewed decision with five judges dissenting, overruled its prior holding in *Dowell* v. *Commissioner*, 68 T.C. 646 (1977), rev'd, 614 F.2d 1263

cord, *Dowell* v. *Commissioner*, 68 T.C. 646 (1977), rev'd, 614 F.2d 1263 (10th Cir. 1980), petition for cert. pending, No. 82-1873; *Britton* v. *United States*, 532 F. Supp. 275 (D. Vt. 1981), aff'd mem., 697 F.2d 288 (2d Cir. 1982) (table).

b. *No. 82-1509.* Petitioner Deleet Merchandising Corp. ("Deleet") filed timely corporate income tax returns for 1967 and 1968; these returns failed to report certain receipts derived from its printing supply business. On August 9, 1973, Deleet filed amended returns for 1967-1968 disclosing the unreported receipts (J.A. 57a-70a).[4] After the completion of criminal and civil investigations stemming from disclo-

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(10th Cir. 1980), that the unlimited assessment period specified in Section 6501(c)(1) continues to apply in such circumstances.

[4] Deleet asserts (D. Br. 6, 27) that its amended returns were "completely accurate" and that it acted "voluntarily and without any coercion from the Government whatsoever." The Commissioner, however, has asserted additional deficiencies in tax for 1967-1968, beyond the amounts shown as due on Deleet's original and amended returns, and Deleet's correct tax liability has not yet been determined. And while it is not material here whether the amended returns were, in fact, voluntarily submitted, the examining agent's audit report, which was filed with the district court, indicates that Deleet amended its returns only after one Martin Windell, a former corporate officer, had threatened to disclose to the Internal Revenue Service an alleged scheme by Deleet's officers to divert corporate profits to themselves. See Defendant's Answers to Plaintiff's First Set of Interrogatories, Exh. 1, pp. 1-2. Although Deleet has not conceded that its original returns were fraudulent, both the district court (D. Pet. App. 4d) and the Third Circuit (D. Pet. App. 3a n.3) assumed, for purposes of Deleet's summary judgment motion, that they were. The same assumption should govern disposition of the case in this Court.

sures made by certain of Deleet's officers,[5] the Commissioner, on December 14, 1979, issued a notice of deficiency to the company (D. Pet. App. 4a; J.A. 71a). The notice asserted deficiencies in tax and fraud penalties for 1967 and 1968.[6]

Deleet paid the disputed amounts and brought suit for a refund in the United States District Court for the District of New Jersey. On motion for summary

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[5] These investigations focused on allegations that corporate receipts had been diverted to company employees. See p. 4 n.4, *supra*. Deleet itself was not charged with criminal tax violations, nor was a formal criminal investigation initiated as to it. On March 6, 1976, however, a two-count information was filed against Martin Windell, a former officer and shareholder, charging him with omitting from his 1969-1970 individual tax returns substantial sums that had been diverted from the company. Mr. Windell pled guilty to one count of violating Section 7201 (governing willful attempts to evade or defeat tax); the second count was dismissed. See *United States* v. *Windell*, Crim. No. 76-96 (D.N.J. May 28, 1976). Contrary to Deleet's assertion, Br. 36 n.15, the record in this case reflects these matters. See Defendant's Answers to Plaintiff's First Request for Production of Documents, Exh. 1, pp. 2, 7-8; Defendant's Answers to Plaintiff's First Set of Interrogatories, Exh. 1, pp. 1-2, 6-7, 9, 47. At all events, this Court may take judicial notice of the related court proceedings. See *Bryant* v. *Carleson*, 444 F.2d 353, 357-358 (9th Cir.), cert. denied, 404 U.S. 967 (1971).

[6] On the same date, the Commissioner sent deficiency notices to several of Deleet's officers, asserting deficiencies in tax and liability for civil fraud penalties against them. See *Kramer* v. *Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Liroff* v. *Commissioner*, 44 T.C.M. (CCH) 43 (1982); *Derfel* v. *Commissioner*, 44 T.C.M. (CCH) 45 (1982); *Liroff* v. *Commissioner*, 44 T.C.M. (CCH) 47 (1982). Following its decision in *Klemp*, the Tax Court in each case held that assessment of the deficiencies and fraud penalties was barred by the three-year statute of limitations.

judgment, Deleet contended that the Commissioner's action was barred by the statute of limitations. It argued, as petitioners had argued to the Tax Court in *Badaracco*, that no deficiencies or penalties could be assessed more than three years after its amended returns were filed, regardless of whether its original returns were fraudulent. The district court agreed, likewise relying on *Dowell* and *Klemp*, and granted summary judgment in favor of Deleet. D. Pet. App. 1d-5d.

c. *The appeals.* The government appealed to the Third Circuit from the Tax Court's decision in No. 82-1453 and from the district court's judgment in No. 82-1509. The cases were heard together and decided in a single opinion by the court of appeals, which reversed in both cases, one judge dissenting. B. Pet. App. 4a-20a; D. Pet. App. 1a-17a.

The majority reasoned (B. Pet. App. 9a) that Section 6501(c)(1) on its face permits the Commissioner, "[i]n the case of a false or fraudulent return with the intent to evade tax," to assess the tax, or to proceed in court without an assessment, "at any time." The court found nothing in the Code, its legislative history, or the Treasury Regulations to suggest that taxpayers who had filed fraudulent returns could thereafter secure, by filing amended returns or otherwise, the benefit of the general three-year limitations period. While rejecting petitioners' argument that questions of statutory construction should be answered by reference to "tax policy," the court observed (B. Pet. App. 10a-13a) that substantial policy considerations in fact supported a literal reading of the statute. The court noted that Congress has charged the Commissioner with the duty of proceeding both criminally and civilly against taxpayers

who file fraudulent returns, and it found "strong reasons for believing that a three year limitations period is not adequate to permit the Commissioner to meet his dual responsibility." B. Pet. App. 12a-13a. Accord, *Nesmith* v. *Commissioner*, 699 F.2d 712 (5th Cir. 1983) (per curiam), petition for cert. pending, No. 82-2008. The dissenting judge expressed agreement with the Tenth Circuit's decision in *Dowell* and stated that, in his view, the Commissioner has no need for an unlimited assessment period once an amended return has been filed that provides "all the information required by law" (B. Pet. App. 18a).

SUMMARY OF ARGUMENT

These cases involve construction of the statute of limitations on tax assessments. Section 6501(a) ordinarily requires the Commissioner to assess the tax within three years after a return is filed. Section 6501(c), however, lists several situations in which the tax may be assessed "at any time." One of these situations, specified in Section 6501(c)(1), is a "case of a false or fraudulent return with the intent to evade tax." The question presented here is whether, under circumstances where a taxpayer has filed a false or fraudulent return, but has thereafter filed a nonfraudulent amended return, the timeliness of the Commissioner's assessment is governed by the general three-year limitations period of Section 6501(a) or by the unlimited assessment period of Section 6501(c)(1).

1. The court of appeals correctly held that the Commissioner is entitled to the continued benefit of Section 6501(c)(1) in such circumstances. The language of that Section, permitting assessment "at any time" in the case of fraudulent returns, is unqualified

on its face. Nothing in Section 6501(c)(1) or its legislative history suggests that a fraudulent filer can "call off" its operation by filing an amended return, or by otherwise repenting of his fraud. Since statutes of limitations "must receive a strict construction in favor of the Government," *E.I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924), the plain language of the statute should govern the outcome here.

The natural reading of the statutory language is strongly supported by the overall structure of the Code's limitations provisions. The Code nowhere explicitly provides for the filing of amended returns, and Congress is thus unlikely to have intended that they would affect the operation of Section 6501. Until the Tenth Circuit's decision in *Dowell*, this Court and the lower courts had consistently held, in a variety of situations, that the application of the limitations provisions turns on a taxpayer's original, and not his amended, returns. Petitioners' proposed statutory construction, moreover, produces anomalous results when its impact on other portions of Section 6501 is considered.

The natural reading of the statutory language is likewise supported by the substantive operation of the fraud provisions themselves. It is well established that a taxpayer does not, by subsequent repentance, immunize himself from liability for a fraudulent filing. If an amended return does not bar the imposition of the fraud penalty, it should not cut short the time within which that penalty may be assessed.

2. Petitioners do not seriously dispute that a literal reading of Section 6501 supports the court of appeals' holding. Rather, they urge a nonliteral reading of the

statute on grounds of equity and tax policy. They contend that the Commissioner no longer needs an unlimited assessment period once he has the information that a nonfraudulent amended return provides him.

The court of appeals correctly held that strong policy reasons in fact support a literal reading of the statute. Fraud is difficult to investigate, and the Commissioner must bear the burden of proving it. While an amended return may evidence an underpayment of tax, it does not, standing alone, constitute an admission of fraud. Amended returns, moreover, come with no special guarantee of trustworthiness; the information they furnish must be investigated no less thoroughly than other post-return information provided by a taxpayer or third parties. Most importantly, the Commissioner has a duty to proceed both criminally and civilly against taxpayers who file fraudulent returns. Once a case has been referred to the Justice Department for criminal prosecution, the Commissioner, for reasons of policy and practicality, will generally find it difficult to complete his civil audit within the normal three-year period, and the filing of an amended return will make no difference in this respect.

3. In an effort to find some textual support for their proposed statutory construction, petitioners contend that their fraudulent original returns should be deemed "nullities," *i.e.*, "non-returns," for purposes of Section 6501(a), and that their amended returns are thus the only "returns" for the taxable years in question. But there is no authority for the proposition that a return which purports on its face to be a return is a "nullity" merely because it is fraudulent. Indeed, Section 6501(c)(1) itself uses the phrase,

"false or fraudulent return," plainly indicating that such documents are "returns" for statute-of-limitations purposes.

4. Finally, petitioners object to a literal reading of the statute because it produces a "disparity in treatment" as between fraudulent filers and fraudulent non-filers. It is settled that the normal three-year limitations period begins running when a taxpayer submits a late-filed return, regardless of whether his failure to file timely was due to fraud. Petitioners contend that the result should be the same when a taxpayer who has filed a fraudulent return later submits an honest amended one.

The plain language of the statute, however, mandates different results in these two situations. Section 6501(c)(3) permits assessment at any time "[i]n the case of failure to file a return." That section thus becomes inapplicable by its terms once a return is filed. Section 6501(c)(1), by contrast, applies indefinitely when a fraudulent return has been submitted, since the case remains a "case of a false or fraudulent return" regardless of the taxpayer's later conduct. Congress simply did not distinguish, for limitations purposes, between fraudulent and non-fraudulent failures to file, whereas it separately addressed the problem of fraudulent returns in Section 6501(c)(1).

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT, WHERE A TAXPAYER FILES A FALSE AND FRAUDULENT INCOME TAX RETURN FOR ANY YEAR, THE TAX FOR THAT YEAR MAY BE ASSESSED OR COLLECTED AT ANY TIME, REGARDLESS OF WHAT STEPS THE TAXPAYER MAY LATER TAKE

These cases involve the proper construction of the statute of limitations on tax assessments. It has long been established that statutes of limitations restricting the assertion of federal rights "must receive a strict construction in favor of the Government." *E.I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924). This principle has special force as applied to federal tax claims. This Court has stressed "[t]he necessity for meticulous compliance by the taxpayer with all named conditions in order to secure the benefit of the limitation." *Lucas* v. *Pilliod Lumber Co.*, 281 U.S. 245, 249 (1930). The courts of appeals have repeatedly held that statutes barring collection of federal taxes "are strictly construed in favor of the government" and that "their applicability will not be presumed in the absence of clear congressional action." *McDonald* v. *United States*, 315 F.2d 796, 801 (6th Cir. 1963). See, *e.g.*, *Lucia* v. *United States*, 474 F.2d 565, 570 & n.14 (5th Cir. 1973) (citing cases).

A. The language of Section 6501(c)(1) unambiguously permits assessment at any time in the case of a false or fraudulent return, and this natural reading of the statutory language comports with the overall structure and operation of the Code's limitations provisions

1. The statutory scheme governing limitations on tax assessments is outlined in Section 6501 of the Code. Section 6501(a) sets forth the general rule

establishing a three-year period of limitations on the assessment and collection of any tax. It states: "Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * *." Section 6501(e)(1)(A) sets forth an extended limitations period in situations where a taxpayer's return nonfraudulently omits more than 25% of his gross income, permitting assessment in such cases "at any time within 6 years after the return was filed." Both the three-year rule and the six-year rule, however, are explicitly made inapplicable in circumstances covered by Section 6501(c).

Section 6501(c) identifies three situations in which the Commissioner is allowed an unlimited period within which to assess tax. Section 6501(c)(1) provides: "In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time." Section 6501(c)(3) provides that, "[i]n the case of failure to file a return, the tax may be assessed * * * at any time." And Section 6501(c)(2) sets forth a similar rule in the case of willful attempts to evade or defeat taxes other than income, estate, and gift taxes.[7]

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[7] A question as to the application of Section 6501(c)(2) similar to that presented here was considered, but not decided, by the Fifth Circuit in *Woolf* v. *United States*, 578 F.2d 1103, 1106 (1978). Contrary to Deleet's contention (D. Br. 31), the Fifth Circuit in *Woolf* did not reject "an overly literal construction" of the statute. Indeed, the Fifth Circuit has since ruled in favor of the Commissioner on the precise question reserved in *Woolf* and presented here. See *Nesmith* v. *Commissioner*, 699 F.2d 712 (5th Cir. 1983), petition for cert. pending, No. 82-2008.

The instant cases are squarely controlled by the unambiguous language of Section 6501(c)(1). Petitioners concededly filed (or are deemed for purposes of decision to have filed) "false or fraudulent return[s] with the intent to evade tax." Section 6501(c)(1), allowing the tax to be assessed "at any time" in such circumstances, is unqualified on its face. Nothing in the statute or its legislative history can be construed to "call off" its operation in light of a fraudulent filer's later conduct.[8] Nor is there anything in Section 6501(a) that enables a taxpayer to reinstate its general, three-year limitations period by filing an amended return. Indeed, as discussed more fully below (pp. 31-32, *infra*), the Code does not explicitly provide either for a taxpayer's filing, or for

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[8] The filing of a false or fraudulent return has, under every income tax statute since 1918, indefinitely extended the period of limitations for assessment of tax. See, *e.g.*, Revenue Act of 1924, ch. 18, § 250(d), 40 Stat. 1083 ("In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due"); Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 265 ("[I]n the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined * * * at any time after it becomes due * * *"). See generally 10 J. Mertens, *Law of Federal Income Taxation* § 57.36 (1976). The legislative history is sparse. The Senate Report accompanying Section 276(a) of the Revenue Act of 1934, ch. 277, 48 Stat. 745, states Congress's intention that the Commissioner be permitted to assess the tax "without regard to the statute of limitations" in the case of a fraudulent return. S. Rep. No. 558, 73d Cong., 2d Sess. 43 (1934). Reports from earlier years are silent on the provision or simply repeat the statutory language. *E.g.*, H.R. Rep. No. 767, 65th Cong., 2d Sess. 34-35 (1918); S. Rep. No. 275, 67th Cong., 1st Sess. 21, 32 (1921); H.R. Rep. No. 179, 68th Cong., 1st Sess. 26 (1924).

the Commissioner's acceptance, of amended returns, which are creatures of administrative origin. Thus, when Congress provided for assessment at any time "[i]n the case of a false or fraudulent return," Congress plainly meant "[i]n the case of a false or fraudulent [*original*] return"—precisely the situation here. Until the Tenth Circuit's decision in *Dowell*, the courts had consistently held, in decisions dating to the earliest years of the federal income tax, that the operation of Section 6501 and its predecessors turns on the nature of the taxpayer's original, and not his amended, returns.[9] These decisions, like the decision below, properly accorded the statute its plain—indeed, its only reasonable—construction.

2. The conclusion that Section 6501(c)(1) permits assessment "at any time" in fraud cases, regardless of a taxpayer's later repentance, is confirmed by the substantive operation of the fraud provisions themselves. It is well established that a taxpayer who sub-

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[9] The courts had uniformly held, for example, that the filing of an amended return does not serve to extend the period within which the Commissioner may assess a deficiency. *E.g.*, *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172 (1934); *National Paper Products Co.* v. *Helvering*, 293 U.S. 183 (1934); *National Refining Co.* v. *Commissioner*, 1 B.T.A. 236 (1924). The courts had also held that the filing of an amended return does not serve to reduce the period within which the Commissioner may assess taxes where the original return omits enough income to trigger the operation of the extended (now, six-year) limitations period provided by Section 6501(e) or its predecessors. *Houston* v. *Commissioner*, 38 T.C. 486 (1962); *Goldring* v. *Commissioner*, 20 T.C. 79 (1953). And the courts had held that the statute of limitations for filing a refund claim under the predecessor of Section 6511(a) begins to run on the filing of the original, not the amended, return. *Kaltreider Construction, Inc.* v. *United States*, 303 F.2d 366, 368 (3d Cir.), cert. denied, 371 U.S. 877 (1962).

mits a fraudulent return does not, by subsequent voluntary disclosure, thereby purge the fraud inherent in his prior act; the fraud was committed, and the offense completed, when the original return was prepared and filed. See, *e.g.*, *United States* v. *Habig*, 390 U.S. 222 (1968); *Plunkett* v. *Commissioner*, 465 F.2d 299, 302-303 (7th Cir. 1972); *Swallow* v. *United States*, 307 F.2d 81 (10th Cir. 1962).[10] Once a fraudulent return has been filed, in short, the case remains a "case of a false or fraudulent return," regardless of the taxpayer's later conduct, for purposes of criminal prosecution and civil fraud liability under Section 6653(b). The case should likewise remain a "case of a false or fraudulent return" for purposes of the unlimited assessment period provided by Section 6501(c)(1). As Judge Parker of the Tax Court wrote in her *Klemp* dissent, "[if] the filing of a nonfraudulent amended return does not bar the imposition of the fraud penalty itself, * * * it should not cut short the time within which that penalty may be assessed." 77 T.C. at 211-212 (Parker, J., dissenting).

3. Petitioners suggest that Section 6501(c)(1) should be read merely to "suspend" commencement of

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[10] This well-established principle was recognized by the dissenting judge below (B. Pet. App. 19a n.7) and by the Tax Court in *Klemp* (77 T.C. at 206 n.9). As the Tax Court explained in *George M. Still, Inc.* v. *Commissioner*, 19 T.C. 1072, 1077 (1953), aff'd, 218 F.2d 639 (2d Cir. 1955):

> Any other result would make sport of the so-called fraud penalty. A taxpayer who had filed a fraudulent return would merely take his chances that the fraud would not be investigated or discovered, and then, if an investigation were made, would simply pay the tax which he owed anyhow and thereby nullify the fraud penalty. We think Congress has provided no such magic formula to avoid the civil consequences of fraud.

the limitations period while fraud remains uncorrected, *i.e.*, "to deny to the taxpayer the benefits of a statute of repose for that period during which he has failed to discharge his legal obligation." D. Br. 15. The Tenth Circuit in *Dowell*, reasoning similarly, characterized Section 6501(c)(1) as putting the three-year limitations period "in limbo" pending further taxpayer action. 614 F.2d at 1265-1266.

The statutory language, however, is contrary to petitioners' contention. Section 6501(c)(1) does not "suspend" the operation of Section 6501(a) until a fraudulent filer makes voluntary disclosure; the former section makes no reference at all to the latter, providing simply that the tax may be assessed "at any time." And Section 6501(a) contains no mechanism for "snapping back into play" when a fraudulent filer repents; by its terms, it does not apply to any case—such as a "case of a false or fraudulent return"—that is "otherwise provided" for in Section 6501. Where Congress has intended only a temporary suspension of the running of the limitations period, it has had no difficulty drafting statutory provisions that unambiguously accomplish this result. See, *e.g.*, I.R.C. § 6503(a)(1) ("The running of the period of limitations provided in section 6501 * * * shall (after the mailing of a [deficiency] notice * * *) be suspended for the period during which the Secretary is prohibited from making the assessment * * *").[11] Congress evinced no intent to accomplish that result here.

4. The weakness of petitioners' proposed statutory construction is further shown by its impact on Sec-

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[11] See also, *e.g.*, I.R.C. § 6503(a)(2), (b), (c) and (d), App., 3a-5a, *infra*. Section 6503 as a whole is entitled, "Suspension of [R]unning of [P]eriod of [L]imitation."

tion 6501(e)(1)(A). As noted above, that Section sets forth an extended limitations period in situations where a taxpayer's return nonfraudulently omits more than 25% of his gross income, permitting assessment in such cases "at any time within 6 years after the return was filed." This rule evidently reflects a congressional judgment that, in cases of substantial but nonfraudulent omissions of income, the Commissioner needs an assessment period longer than the three-year period provided for routine tax investigations, but shorter than the unlimited period provided for cases of fraud.

In *Dowell* and *Klemp*, the Commissioner had issued his deficiency notices more than three years after the amended returns were filed, but less than six years after the original returns were filed. Those courts nevertheless ruled the notices untimely, holding that *both* Section 6501(c)(1) *and* Section 6501(e)(1)(A) were inapplicable. 614 F.2d at 1267; 77 T.C. at 206. Accord, *Britton*, 532 F. Supp. at 278.[12] As the Tax Court majority put it (77 T.C. at 206):

> Section 6501(e) explicitly does not apply to situations covered by section 6501(c). * * * Accordingly, no period of limitations began running upon the filing of petitioners' [fraudulent] original return. The only period of limitations that ever became applicable * * * is the [three-year] period provided in section 6501(a) * * *.

The results produced by this reasoning—which Deleet seems to concede (D. Br. 41-43) flow neces-

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[12] Neither the Tax Court in No. 82-1453 nor the district court in No. 82-1509 was required to address the application of Section 6501(e)(1)(A) on the facts of the instant cases. In each case, the notice of deficiency was mailed more than six years after the original returns were filed.

sarily from petitioners' proposed statutory construction—are anomalous. Under the *Klemp* court's reasoning, a taxpayer who *fraudulently* omits 25% of his gross income can gain the benefit of the three-year limitations period by filing an amended return. Yet it is well established that a taxpayer who *innocently* omits 25% of his gross income cannot gain that benefit by filing an amended return; rather, he must live with the six-year period specified in Section 6501(e)(1)(A). *E.g.*, *Houston* v. *Commissioner*, 38 T.C. 486 (1962); *Goldring* v. *Commissioner*, 20 T.C. 79 (1953). As the court of appeals properly noted (B. Pet. App. 12a), there is no justification for "creat[ing] a situation in which persons who [commit] willful, deliberate fraud [are] in a better position" than those who understate their income inadvertently. The *Klemp* court's reasoning, moreover, entails no slight embarrassment to logic, for it assumes that Section 6501(c)(1) is both applicable (in that it is capable of ousting Section 6501(e)) and inapplicable (in that it is incapable of ousting Section 6501(a)) at the same time.

5. In sum, there is scarcely room for doubt that, if the language of the statute is to be accepted at face value, the filing of "a return [that is] fraudulent in any respect with intent to evade a tax * * * deprives the taxpayer of the bar of the statute for that year." *Lowy* v. *Commissioner*, 288 F.2d 517, 520 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962). Accord, Brennan, *The Uncertain Status of Amended Tax Returns*, 7 Rev. Tax'n Individuals 235, 252-264 (1983) (hereinafter *Amended Tax Returns*) (concluding that *Dowell* and *Klemp* were wrongly decided). Nothing in Section 6501(a) or in Section 6501(c)(1) can properly be construed to start the

running of the ordinary limitations period, or any other limitations period, when a taxpayer who has filed a false or fraudulent return makes disclosure, in an amended return or otherwise, of his true taxable income. Rather, as the Third Circuit held here and as the Fifth Circuit held in *Nesmith*, the plain and unambiguous language of Section 6501(c)(1) permits the Commissioner to assess "at any time" the tax for a year in which there has been filed "a false or fraudulent return," notwithstanding any subsequent disclosures the taxpayer might make.

B. A literal construction of the statute is supported by sound considerations of policy and practicality

1. Petitioners do not seriously dispute—indeed, petitioner Deleet explicitly concedes—that a literal reading of Section 6501(c)(1) justifies the court of appeals' holding as to the timeliness of the Commissioner's deficiency determinations. D. Br. 24; see B. Br. 27-29. Petitioners contend, rather, that a flexible, nonliteral reading should be accorded the statute on grounds of equity and tax policy. "Once a taxpayer has provided the information upon which the Government may make a knowledgeable assessment," in petitioners' view, "the justification for suspending the limitations period is no longer viable and must yield to the favored policy of limiting the Government's time to proceed against the taxpayer." D. Br. 12; see B. Br. 17. This was the explicit rationale underlying the decision of the Tenth Circuit in *Dowell* (614 F.2d at 1265) and the majority opinion of the Tax Court in *Klemp* (77 T.C. at 205-206). See also *Britton*, 532 F. Supp. at 278.

These are cases of statutory construction. The question presented here is not whether, as an abstract matter, the rule advocated by petitioners accords with "[c]ommon sense" or "good policy." Contra, *Britton*, 532 F. Supp. at 278; *Klemp*, 77 T.C. at 205. The question, rather, is whether the policy petitioners favor was the policy Congress adopted in enacting Section 6501. As indicated above, the language of that section unambiguously reveals Congress's intention that *no* limitations period is to apply with respect to the assessment of taxes "[i]n the case of a false or fraudulent return." This Court has repeatedly held that courts are not authorized to rewrite a statute because they deem its effects harsh or its operation susceptible of improvement. See *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978); *United States* v. *Calamaro*, 354 U.S. 351, 357 (1957); *Lewyt Corp.* v. *Commissioner*, 349 U.S. 237, 240 (1955); *United States* v. *Olympic Radio & Television, Inc.*, 349 U.S. 232, 236 (1955). Especially is this so when the statute involved is a statute of limitations, which "must receive a strict construction in favor of the Government." *E.I. Dupont de Nemours & Co.*, 264 U.S. at 462.

In any event, contrary to petitioners' contentions, a literal reading of Section 6501(c)(1) is in fact supported by substantial considerations of tax policy. As the court of appeals held, there are "strong reasons" why Congress might conclude that the Commissioner should be entitled to the continued benefit of an unlimited assessment period, notwithstanding the filing of an amended return, where the taxpayer's original return was fraudulent. These considerations are not laid out in the legislative history of Section 6501, which is sparse (see p. 13 n.8, *supra*). Yet they

suffice to dispel any suggestion that the statutory scheme resulting from a literal construction of the section is erratic, irrational, or haphazard.

First, Congress surely recognized that fraud cases are ordinarily far more difficult to investigate than routine tax cases. This is so, in part, because the taxpayer's underlying records will frequently have been falsified or even destroyed.[13] In such circumstances, the filing of an amended return may not substantially diminish the amount of effort required to verify the correct tax liability.

Second, the arrival at an IRS Service Center of a document styled an "amended return" does not fundamentally change the nature of a tax fraud investigation. Amended returns, however accurate they may ultimately prove to be, come with no greater guarantee of trustworthiness than other submissions. A taxpayer suspected of having filed a fraudulent return may later give clues as to his true income, intentionally or inadvertently, in numerous ways—by cooperating with the examining agents, by filing an amended return, or by making admissions in court. Fraud may be disclosed by an informant's testimony, by the taxpayer's books, or by the books of those with whom the taxpayer has dealt. In each instance, the data supplied to the examining agent may or may not be accurate, may or may not be complete. A responsible examiner simply cannot accept the information furnished on an amended return—any more

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[13] The Internal Revenue Manual accordingly instructs examining agents that the "extensive documentation of adjustments required in a fraud case results in more detailed transcripts or extracts and more extended account verification than is required for the examination features in an ordinary case." 2 Internal Revenue Manual (Audit) (CCH) ¶ 4565.32 (3)(c) (1980).

than he can accept other information furnished by the taxpayer or third parties—as a substitute for a thorough investigation into the existence of fraud. There is no "tax policy" justification for holding that amended returns, of all the multifarious data that may bear on tax fraud, have the singular effect of shortening to three years the unlimited assessment period specified in Section 6501(c)(1).

Third, fraud cases differ from other civil tax cases in that the Commissioner has the burden of proof on the question of fraud. Whereas the Commissioner's notice of deficiency is generally entitled to a presumption of correctness, Section 7454(a) provides that, "[i]n any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary." An amended return, of course, may constitute an admission of substantial underpayment. But it will not ordinarily constitute an admission of fraud. As Judge Parker said in her dissenting opinion in *Klemp*, 77 T.C. at 212-213:

> When a taxpayer files a nonfraudulent amended return * * * [the Commissioner] will not necessarily have all of the facts he needs to prove by clear and convincing evidence a fraudulent intent to evade tax. Absent proof of that specific intent, evidence of an underpayment standing alone will not support the imposition of the fraud penalty. Thus, while 3 years may be an adequate period within which to assert the fraud penalty where the taxpayer's fraudulent intent is established in prior criminal proceedings or by stipulation, the 3 years may not be enough time for [the Commissioner] to prove fraudulent intent where a more extensive investigation is required.

Fourth, and most importantly, the difficulties that attend a civil fraud investigation are compounded where, as in *Badaracco*, the Commissioner's initial findings lead him to conclude that the case should be referred to the Justice Department for criminal prosecution.[14] The statute of limitations for prosecuting criminal tax fraud is generally six years. See I.R.C. § 6531. Once a criminal referral has been made, the Commissioner will often find it difficult, if not impossible, to complete his civil investigation within the normal three-year period, and the taxpayer's filing of an amended return will not make any difference in this respect.

This Court has recognized the Commissioner's dual responsibility when investigating tax fraud. *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). The Court there noted that "Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined." *Id.* at 309. Indeed, it is the very interrelationship of these elements which dictates that, once a case has been referred for criminal prosecution, the ordinary tools provided by Congress for investigating civil tax liability—principally, the summons power of Section 7602—become unavailable to the Commissioner. See 437 U.S. at 311-313.[15] Practically speaking, there-

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[14] As noted above (p. 5 n.5 *supra*), criminal prosecution was not recommended against petitioner Deleet, but was recommended against one of Deleet's officers. After that proceeding ended, the civil investigation of the company and its officers continued, culminating in the issuance of deficiency notices to them for additional tax and fraud penalties. See p. 5 n.6, *supra*.

[15] After *LaSalle* was decided, Congress amended Section 7602 to permit the issuance of a summons to investigate both

fore, the Commissioner is often forced to place civil audits in abeyance when criminal prosecutions begin.[16]

Apart from such practical considerations, it has generally been the policy of the Internal Revenue Service to give priority to criminal enforcement, and, whenever possible, to defer civil assessment and collection until related criminal proceedings have ended. See, *e.g.*, 1 Internal Revenue Manual (Administration) (CCH) ¶ 1218, at 1303-78 (1983) ("Experience has demonstrated that attempts to pursue both the criminal and civil aspects of a case concurrently may jeopardize the successful completion of the criminal case"); 2 Internal Revenue Manual (Audit) (CCH) ¶¶ 4565.32(2), 4565.42 (1981).[17] Given the

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civil and criminal tax matters, so long as no "Justice Department referral is in effect." Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 333(a), 96 Stat. 622. The amendment became effective September 3, 1982.

[16] It is no answer to assert, as does petitioner Deleet (D. Br. 37), that the Commissioner will have collected substantial evidence of fraud before referring a case, or that the government must prove the elements of the civil deficiency "in any criminal proceeding for tax evasion." Not all criminal prosecutions involve tax evasion charges under Section 7201; even when they do, the government need only establish that there was a substantial understatement of tax liability, not the precise amount thereof. See, *e.g.*, *United States* v. *Norris*, 205 F.2d 828, 829 (2d Cir. 1953). Moreover, in a criminal prosecution under Section 7206(1), the government need establish only that false statements were made under penalties of perjury as to a material matter. See *United States* v. *DiVarco*, 343 F. Supp. 101 (N.D. Ill. 1972), aff'd, 484 F.2d 670 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974).

[17] The Manual alerts IRS personnel to the following risks, among others, in pursuing parallel civil and criminal investigations: (1) possible premature disclosure of evidence to a defendant; (2) claims of harassment by potential criminal

potential for conflict between the Commissioner's criminal and civil enforcement responsibilities, this policy of deferral has been recognized as both "necessary and wise." *Campbell* v. *Eastland*, 307 F.2d 478, 487 (5th Cir. 1962). In exceptional cases, as where collection is in jeopardy, the government may be forced to proceed on the civil front and seek protective orders to prevent interference with the criminal prosecution. But, as the court below concluded (B. Pet. App. 13a), there is nothing to indicate that Congress intended, in all cases, to "force the Commissioner to decide to proceed with only civil or criminal remedies or to jeopardize both by going forward civilly and criminally at the same time." See also *Amended Tax Returns* 262-263.[18]

2. Petitioners do not seriously dispute that these policy considerations generally support a "plain language" reading of the statute. Yet they vigorously contend (B. Br. 33-34; D. Br. 35-36) that such considerations do not apply on the facts involved here. In their view, the Commissioner should have had no

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defendants; (3) seizure of funds in a civil case that might deny a defendant the criminal attorney of his choice; (4) difficulties with witnesses where the civil trial precedes the criminal trial; and (5) difficulties with the introduction of evidence in a civil case owing to taxpayers' assertion of Fifth Amendment rights.

[18] This Court's decision in *United States* v. *Baggot*, No. 81-1938 (June 30, 1983), may further complicate the Commissioner's expeditious completion of civil audits in fraud cases. The Court there held that grand jury materials may not be disclosed to the IRS for use in civil tax investigations. Thus, while a grand jury may have seen considerable evidence of tax fraud, that evidence will often be unavailable to examining agents as they attempt to complete their civil audits. Rather, the agents will be required to "pick up where they left off" before the case was referred to the Justice Department.

difficulty in issuing deficiency notices within three years after *their* amended returns were filed.

This assertion, even if correct,[19] is irrelevant to decision in these cases. These cases involve construction of a statute of limitations, not a question of laches.[20] The question presented is whether the Commissioner is entitled, as a matter of law, to rely on the unlimited assessment period of Section 6501(c)(1) in cases involving tax fraud. If the court of appeals was correct in its reading of the statute, it is immaterial whether the Commissioner could have acted more promptly in these particular cases.

3. Besides questioning the "tax policy" justification for an unlimited assessment period, petitioners urge that a literal reading of the statute produces inequitable results. In petitioners' view, it is unfair

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[19] On petitioners' reading of Section 6501, the statute of limitations as to Deleet would have expired on August 9, 1976—less than three months after judgment was entered in the criminal tax fraud proceeding against one of its officers. See p. 5 n.5, *supra*. Under the IRS policy of deferring civil audits until the termination of related criminal cases, it would have been extremely difficult for the Service to have finished Deleet's civil audit, prepared the notice of deficiency, and subjected the case to normal administrative review within this time. Indeed, Deleet to this date has not conceded that its original returns were fraudulent, although it is assumed for purposes of decision (see p. 4 n.4, *supra*) that they were. The statute of limitations as to the Badaraccos, on their theory, would have expired on August 17, 1974—slightly more than a year after the criminal case ended. The record does not reveal why the Commissioner's civil investigation was not concluded by that date, or whether it reasonably could have been so concluded.

[20] It is well established that the United States is not subject to the defense of laches. *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940).

for the government "to forever suspend a Sword of Damocles over a taxpayer who at one time may have filed a fraudulent return, but who has subsequently recanted and filed an amended return [that is honest]." D. Br. 26; see B. Br. 16. The dissenting judge below (B. Pet. App. 19a) stressed similar considerations.

Even if equitable considerations were relevant in construing a statute of limitations, they would have little force here. A taxpayer who has filed a fraudulent return with the intent to evade tax is scarcely in a position to complain of the fairness of a rule that facilitates the government's collection of the tax due. Nor is a taxpayer who has been the subject of a tax fraud investigation likely to be caught by surprise when the notice of deficiency arrives, even if it does not arrive promptly after he files an amended return. And petitioners' fear that the government will abuse the unlimited assessment period is unrealistic, for it is scarcely in the Commissioner's interest to delay a deficiency notice unnecessarily. Such delay would only complicate his burden of proving fraud by "clear and convincing evidence," *Kreps* v. *Commissioner*, 351 F.2d 1 (2d Cir. 1965), and could well increase the risk that the tax will become uncollectible in whole or part.

Finally, it cannot reasonably be contended, as petitioner Deleet further argues (D. Br. 14, 44), that a literal reading of the statute "punishes" taxpayers who repentently file amended returns. To the contrary, such a reading leaves them in precisely the same position they were in before. It might be argued that Congress should provide incentives to taxpayers to disclose their fraud voluntarily. But Congress has not chosen to do so in Section 6501, perhaps reasoning that taxpayers already have an incentive

to make voluntary disclosure in the hope of avoiding or mitigating criminal liability. At all events, that legislative judgment is controlling here.

C. A nonliteral reading of the statute cannot be justified on the theory that fraudulent returns are "nullities"

In an effort to find some textual support for their suggested statutory construction, petitioners contend (B. Br. 21-27; D. Br. 32-34) that their original returns, to the extent they were fraudulent, were "nullities" for statute-of-limitations purposes. If the original return is a nullity, the argument runs, the amended return must necessarily be "the return" referred to in Section 6501(a). And if "the return" (as thus defined) is nonfraudulent, the argument concludes, Section 6501(c)(1) is inoperative, and the normal three-year limitations period applies. See *Dowell*, 614 F.2d at 1265.

This argument was properly rejected (B. Pet. App. 8a-9a) by the court of appeals. The notion that fraudulent returns are "nullities" is unsupportable. And it is absolutely clear that "the return" referred to in Section 6501(a) is the original, not the amended, return.

1. Petitioners do not and cannot contend that their fraudulent original returns were "non-returns" for purposes of the Code generally. The numerous Code provisions relating to civil and criminal penalties for submitting or assisting in the preparation of "false or fraudulent returns" make clear that a document which on its face plausibly purports to be in compliance, and which is signed by the taxpayer, is a "return" despite its inaccuracies.[21] Nor do petitioners

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[21] See, *e.g.*, I.R.C. § 7207 (criminal penalty for submission of a "return * * * known * * * to be fraudulent"); I.R.C. § 6531(3) (limitations period for criminal prosecution of per-

contend that their original returns were nullities for all purposes of Section 6501. Indeed, Section 6501 (c)(1) itself uses the phrase, "false or fraudulent return." If a fraudulent return is not a "return" for purposes of Section 6501(c)(1), the section is an oxymoron.

Petitioners contend, rather, that a fraudulent return is a nullity only for the limited purpose of applying Section 6501(a). See B. Br. 24; D. Br. 33-34. But the word "return" appears 64 times in Section 6501. Congress cannot rationally be thought to have given that word one meaning in Section 6501(a), and a totally different meaning in Section 6501(b) through (q).

Nor does this Court's decision in *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172 (1934), support petitioners' argument that fraudulent returns are "nullities," whether for purposes of Section 6501(a) or for any other purpose. The Court there held that a taxpayer's original return, despite its inaccuracy,

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sons who aid in preparation of "a false or fraudulent return"); I.R.C. § 6653(b) (civil penalty where underpayment of tax "required to be shown on a return is due to fraud"). Difficult questions may arise as to whether a "return" has been filed in "tax protester" cases, where a document is submitted that on its face does not purport to furnish the information necessary to compute a tax liability. Compare, *e.g.*, *United States* v. *Stout*, 601 F.2d 325, 328 (7th Cir.), cert. denied, 444 U.S. 979 (1979) (blank Form 1040 accompanied by assertions of Fifth Amendment privilege is not a "return") and *United States* v. *Edelson*, 604 F.2d 232, 234 (3d Cir. 1979) (Form 1040 listing income in "constitutional dollars," *i.e.*, dollars backed by silver, is not a "return") with *United States* v. *Long*, 618 F.2d 74, 75-76 (9th Cir. 1980) (Form 1040 with zeros inserted in all available spaces is a "return"). The "tax protester" cases have no application here, for petitioners' original returns, while inaccurate, purported on their face to furnish information necessary to compute the tax.

was a "return" for limitations purposes, so that the taxpayer's filing of an amended return did not start a new limitations period running. The Court stated that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such * * * and evinces an honest and genuine endeavor to satisfy the law." 293 U.S. at 180.

Here, the taxpayers' original returns similarly purported to be returns, were sworn to as such, and appeared on their face to constitute genuine endeavors to satisfy the law. And while petitioners' original returns were not, in fact, honest, one cannot infer from *Zellerbach* the answer to a question that was not before the Court in that case: whether a purported return that does *not* constitute an honest attempt to satisfy the law is, without more, "not a return." Indeed, elementary logic teaches that the contrapositive of a hypothesis is not necessarily true.[22]

2. The language and structure of the Code likewise refute petitioners' contention that a fraudulent filer's amended return becomes, in view of his origi-

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[22] The other decisions of this Court cited by petitioners on this point (B. Br. 22-26; D. Br. 13-15) are likewise inapposite. In *Florsheim Brothers Drygoods Co.* v. *United States*, 280 U.S. 453 (1930), the Court held that a "tentative return" did not start the running of the statute of limitations since it did not contain, and did not purport to contain, sufficient information to allow the Commissioner to compute and assess the tax. Here, by contrast, petitioners' returns on their face set forth an asserted basis for computing their tax, even though the information set forth was inaccurate. *Germantown Trust Co.* v. *Commissioner*, 309 U.S. 304 (1940), merely held that a submission containing the information necessary to compute the tax, but on the wrong form, constituted a "return" sufficient to start the running of the statute of limitations.

nal return's null status, "the return" for purposes of Section 6501(a). The Code itself neither requires the taxpayer's filing nor mandates the Commissioner's acceptance of amended returns.[23] As this Court pointed out in *Hillsboro National Bank* v. *Commissioner*, No. 81-485 (Mar. 7, 1983), slip op. 8 n.10, "it is settled that the acceptance of [an amended return] after the date for filing a return is not covered by statute but [is] within the discretion of the Commissioner." See, *e.g.*, *Koch* v. *Alexander*, 561 F.2d 1115, 1117 (4th Cir. 1977) (per curiam); *Miskovsky* v. *United States*, 414 F.2d 954, 955 & n.4 (3d Cir. 1969) (citing cases). To be sure, the Treasury Regulations do provide for the filing of amended returns in certain situations, and specific forms are furnished by the Internal Revenue Service for this purpose.[24]

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[23] As petitioner Deleet notes (D. Br. 21, 32 n.13), the Code in several places acknowledges the existence of amended returns. See, *e.g.*, I.R.C. § 6213(g)(1) (providing that "return" for purposes of assessing tax due upon correction of mathematical errors includes any return, statement, or list and "any amendment or supplement thereto * * *"); I.R.C. § 6103(b)(1) (providing that "return" for purposes of confidentiality and disclosure provisions includes "any amendment or supplement" to a return). But the Code nowhere requires or explicitly provides for a taxpayer's filing of amended returns.

[24] Treas. Reg. § 301.6402-3(a) provides that an amended return (in lieu of Form 843, entitled "Claim") may be filed where the taxpayer seeks a refund of tax erroneously paid. Conversely, if a taxpayer later ascertains that income was improperly omitted or a deduction improperly claimed in a prior taxable year, the Regulations provide that he "should" file an amended return and pay the additional tax due unless the statute of limitations has run. Treas. Reg. §§ 1.451-1(a), 1.461-1(a)(3)(i). These Regulations do not *require* the filing of amended returns.

But while an amended return may constitute *a* return for a taxable year, it does not follow that it therefore becomes "the return" for purposes of Section 6501(a). The Tax Court noted as early as 1924 that the use of the definite article in the predecessor of that section indicates Congress's intention that only one return—viz., the first return filed—would be of operative significance for any tax year. *National Refining Co.* v. *Commissioner*, 1 B.T.A. 236 (1924). See also *Evans Cooperage, Inc.* v. *United States*, 712 F.2d 199, 204 (5th Cir. 1983) (rejecting argument that amended return should be regarded as "the return for the taxable year" for purposes of Section 6655(b)(1), governing penalty for failure to pay estimated tax).

In sum, nothing in the language of the statute, the structure of the Code, or the decided cases supports petitioners' contention that fraudulent returns are "nullities" for statute-of-limitations purposes. The reason that fraudulent returns lie outside the scope of Section 6501(a) is not that they are not "returns" within the meaning of that section. The reason, rather, is that they are "false or fraudulent returns" within the meaning of Section 6501(c)(1).

D. A nonliteral reading of the statute cannot be justified by the asserted need to avoid disparate treatment as between fraudulent filers and fraudulent non-filers

Petitioners contend (B. Br. 18-20; D. Br. 15-17, 26) that a literal reading of Section 6501(c) produces a "disparity in treatment" between taxpayers who, in the first instance, file a fraudulent return and those who, in the first instance, fraudulently fail to file any return at all. In petitioners' view (D. Br. 44), such a disparity unjustifiably "elevat[es] one form of tax fraud over another." This argument,

accepted by the Tenth Circuit in *Dowell* (614 F.2d at 1265-1266), was properly rejected by the court of appeals here (B. Pet. App. 9a-10a & n.6).

As noted above, Section 6501(c)(3) provides that, "[i]n the case of failure to file a return, the tax may be assessed * * * at any time." It is now settled that this section ceases to apply once a return has been filed for a particular year, regardless of whether that return is filed late and regardless of whether the taxpayer's failure to file a timely return in the first instance was due to fraud. See *Bennett* v. *Commissioner*, 30 T.C. 114 (1958), acq., 1958-2 C.B. 3. Accord, Rev. Rul. 79-178, 1979-1 C.B. 435. Citing this principle, the *Dowell* court reasoned (614 F.2d at 1265-1266) that the filing of a nonfraudulent *amended* return, in the wake of a fraudulent original filing, is essentially analogous to the filing of a nonfraudulent *late* return, in the wake of a fraudulent failure to file. The Tenth Circuit accordingly concluded that Section 6501 should be read to produce the same statute-of-limitations result in each situation.

As the court of appeals in the present cases correctly noted, however, "Congress provided a clear indication" on the face of the statute that it *did* intend different statute-of-limitations results in these two situationts (B. Pet. App. 10a n.6). Congress's intention is evident in the language of both Section 6501(c) and Section 6501(a).

1. Section 6501(c)(3) applies "[i]n the case of failure to file a return." The section does not speak of failure to file a *timely* return,[25] nor does it speak

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[25] Compare I.R.C. § 6651(a)(1) (providing civil penalties for failure "to file any return * * * on the date prescribed therefor * * *"); I.R.C. § 7203 (providing criminal penalties for willful failure to make returns or furnish information "at the time or times required by law or regulations * * *").

of a *fraudulent* failure to file. Thus, it becomes literally inapplicable once a return has been submitted, regardless of whether the return is filed late, and regardless of whether the failure to file a timely return was due to fraud.

Section 6501(c)(1), by contrast, applies "[i]n the case of a false or fraudulent return." As noted above (pp. 13-14, *supra*), that section by its terms continues to apply indefinitely once a fraudulent return has been filed. The fact that a fraudulent filer subsequently submits an amended return, or otherwise cooperates in a civil or criminal investigation, does not make the case any less a "case of a false or fraudulent return." Accord, *Woolf* v. *United States*, 578 F.2d 1103, 1105 (5th Cir. 1978). In short, although Sections 6501(c)(1) and 6501(c)(3) are similar in some respects, they lead ineluctably to different results in the two situations posited by petitioners.[26]

2. If Section 6501(c) leaves any doubt whether Congress intended that different statute-of-limitations consequences should govern fraudulent and late-filed returns, that doubt is eliminated by Section 6501(a).

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[26] As petitioner Deleet notes (D. Br. 17-19), the provisions now set forth in Sections 6501(c)(1) and 6501(c)(3) were contained in a single subsection from 1921 until the 1954 recodification of the tax laws. See, *e.g.*, Internal Revenue Code of 1939, ch. 2, § 276(a), 53 Stat. 87 ("In the case of a false or fraudulent return with the intent to evade tax or of a failure to file a return the tax may be assessed * * * at any time"). The 1918 version of the statute did not mention failure to file returns; it provided an unlimited assessment period only in the case of false or fraudulent returns. Revenue Act of 1918, ch. 18, § 250(d), 40 Stat. 1083. Nothing in the legislative materials suggests that Congress intended the two provisions to operate in identical fashion. And the language Congress used clearly indicates that it did not.

That Section specifically provides that the normal three-year assessment period begins to run on the date "the return was filed (whether or not such return was filed on or after the date prescribed) * * *." Section 6501(a) does not inquire into why a return was filed late; it applies whether the failure to file a timely return was innocent or negligent, excusable or fraudulent.

Here again, the language of the statute inescapably produces different results in the two situations posited by petitioners. Section 6501(a) on its face provides that the filing of a nonfraudulent *late* return will start the general three-year limitations period running.[27] The Section just as plainly contains nothing to suggest that the filing of a nonfraudulent *amended* return will have this effect.

3. As petitioner Deleet notes (D. Br. 35-40), cases of fraudulent failure to file give rise to some of the same investigatory and enforcement problems as do cases of fraudulent returns. Arguably, therefore, the "tax policy" considerations discussed above (see pp. 20-25, *supra*) would support giving the Commissioner an unlimited period of assessment in both situations, regardless of the taxpayer's subsequent efforts to set the record straight. For whatever reason, however,

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[27] The parenthetical phrase in Section 6501(a) (quoted above) was added in 1954; its predecessor provided simply that the tax "shall be assessed within three years after the return was filed." Internal Revenue Code of 1939, ch. 2, § 275(a), 53 Stat. 86. Courts construing the earlier version uniformly held that a late-filed return was "the return" for the taxable year, and that the normal limitations period began to run on the date such return was submitted. *E.g.*, *Automobile Club* v. *Commissioner*, 353 U.S. 180, 186-187 (1957). The addition of the parenthetical phrase in 1954, therefore, merely restated the law.

Congress has chosen not to do so,[28] and has manifested that decision in unambiguous statutory language.

CONCLUSION

The judgment of the court of appeals should be affirmed in both No. 82-1453 and No. 82-1509.

Respectfully submitted.

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[28] The point is not that Congress discretely afforded different limitations treatment to two arguably similar categories of fraudulent conduct. Congress simply did not distinguish, for limitations purposes, between fraudulent and nonfraudulent failures to file; rather, it placed all cases of "failure to file a return" in a single category under Section 6501(c)(3). In Section 6501(c)(1), by contrast, Congress explicitly and separately addressed the problem of fraudulent returns, providing that, where fraud is involved, the tax may be assessed "at any time."

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6501. Limitations on assessment and collection

(a) General rule

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

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(c) Exceptions

(1) False return

In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) Willful attempt to evade tax

In the case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may

be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) No return

In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

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(e) Substantial omission of items

Except as otherwise provided in subsection (c)—

(1) Income taxes

In the cases of any tax imposed by subtitle A—

(A) General rule

If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. * * *

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Section 6503. Suspension of running of period of limitation

(a) Issuance of statutory notice of deficiency

(1) General rule

The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 (relating to income, estate, gift and certain excise taxes), shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

(2) Corporation joining in consolidated income tax return

If a notice under section 6212 (a) in respect of a deficiency in tax imposed by subtitle A for any taxable year is mailed to a corporation, the suspension of the running of the period of limitations pro-

vided in paragraph (1) of this subsection shall apply in the case of corporations with which such corporation made a consolidated income tax return for such taxable year.

(b) Assets of taxpayer in control or custody of court

The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

(c) Taxpayer outside United States

The running of the period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period during which the taxpayer is outside the United States if such period of absence is for a continuous period of at least 6 months. If the preceding sentence applies and at the time of the taxpayer's return to the United States the period of limitations on collection after assessment prescribed in section 6502 would expire before the expiration of 6 months from the date of his return, such period shall not expire before the expiration of such 6 months.

(d) Extensions of time for payment of estate tax

The running of the period of limitation for collection of any tax imposed by chapter 11 shall be suspended for the period of any extension of time for payment granted under the provisions of section 6161(a)(2) or (b)(2) or under the provisions of section 6163 or 6166.

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Section 6653. Failure to pay tax

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(b) Fraud

If any part of any underpayment (as defined in subsection (c)), of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. * * *

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